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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Truth-in-Billing	)	
and	)	CC Docket 98-170
Billing Format	)	

THE UNITED STATES TELEPHONE ASSOCIATION'S COMMENTS ON THE FCC'S INITIAL REGULATORY FLEXIBILITY ANALYSIS; AND INITIAL PAPERWORK REDUCTION ACT OF 1995 ANALYSIS FROM THE <u>FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING</u>

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Dated: July 9, 1999

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SUMMARY

USTA files this action to protect the interests of its small incumbent local exchange carrier (SILEC) Members in addressing issues relevant to the Commission's initial analyses with regard to (1) the Regulatory Flexibility Act of 1980 (RFA); and (2) the Paperwork Reduction Act of 1995 (PRA). USTA believes the FCC's present IRFA accompanying the TIB Order is flawed in three significant respects. Specifically, the FCC: (1) failed to consider that SILECs are small businesses under the U.S. Small Business Administration's definition; (2) failed to fully consider, as recommended by the Office of Management and Budget (OMB), the impact on SILECs of having to comply with the TIB Order during a period critical to the companies' efforts in preparing for Year 2000 computer compliance (Y2K) matters; and (3) failed to recognize that SILECs will incur tremendous regulatory, managerial and economic burdens in having to be in compliance by July 26, 1999. In regards to the PRA, USTA submits its comments filed before the Office of Management and Budget (OMB) and incorporates those comments, as well as OMB's response, for the record and the Commission's consideration in this proceeding (See Appendix A). USTA urges the FCC to address the questions raised by OMB in its July 1999 action in this matter and to take the necessary action USTA believes can best protect the interest of its SILEC Members in this matter.

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I. INTRODUCTION AND BACKGROUND

On behalf of its local exchange carrier members, the United States Telephone Association (USTA) through counsel, respectfully submits these Comments on the Federal Communications Commission's (FCC or Commission) *First Report and Order and Further Notice of Proposed Rulemaking* in the above-captioned proceeding.[1] In paras. 105 and 108 of the TIB Order, the FCC requested public comments on its present Initial Regulatory Flexibility Analysis (IRFA). The IRFA addresses issues pertaining to small incumbent local exchange carriers (SILECs). Therefore, USTA files this action to protect the interests of its SILEC Members in addressing issues relevant to the Commission's legal obligation to comply with the Regulatory Flexibility Act of 1980 (RFA).[2] USTA believes the FCC's present IRFA accompanying the TIB Order is

[1] *In re* Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, (rel. May 11, 1999)(TIB Order)(also, the further notice of proposed rulemaking is hereinafter referred to as "FNPRM).

[2]Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. Section 601 et. seq.)], as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Subtitle II of the

flawed in three significant respects. Specifically, the FCC: (1) failed to consider that SILECs are small businesses under the U.S. Small Business Administration's definition; (2) failed to fully consider, as recommended by the Office of Management and Budget (OMB), the impact on SILECs of having to comply with the TIB Order during a period critical to the companies' efforts in preparing for Year 2000 computer compliance (Y2K) matters; and (3) failed to recognize that SILECs will incur tremendous regulatory, managerial and economic burdens in having to be in compliance by July 26, 1999.

USTA also files comments in this matter concerning the Commission's request for comments addressing the Commission's initial Paperwork Reduction Act of 1995 (PRA) analysis, pursuant to the TIB Order at ¶ 112. In regards to the PRA, USTA submits its comments filed before the Office of Management and Budget (OMB) and incorporates those comments, as well as OMB's response, for the record and the Commission's consideration in this proceeding. Those comments and the OMB responses are incorporated in Appendix A of this instant filing. USTA urges the FCC to address the questions raised by OMB in its July 1999 action in this matter; and to otherwise take action consistent with OMB recommendations made throughout the proceeding; and those made by USTA herein concerning both the IRFA and the PRA.

USTA supports the Commission's efforts to establish broad principles and guidelines for "truth-in-billing," in order to ensure that consumers receive thorough, accurate, and understandable bills from carriers, while attempting to allow carriers a degree of flexibility in

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Contract with America Advancement Act [Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. Section 612(a)).

implementing the principles and guidelines. In order to lessen the regulatory burden of the FCC's proposed rules on SILECs and to allow for much needed regulatory flexibility, USTA had argued against the imposition of detailed rules in its prior comments in this proceeding.[3] To the extent the Commission has adopted truth-in-billing principles and guidelines rather than detailed rules in the TIB Order, USTA commends the Commission for its stated intention to incorporate flexibility in deference to local exchange carriers and other telecommunications carriers.

USTA believes the FCC's present IRFA accompanying the TIB Order is flawed in three significant respects. Specifically, the FCC: (1) failed to consider that SILECs are small businesses under the U.S. Small Business Administration's definition; (2) failed to fully consider, as recommended by the Office of Management and Budget (OMB), the impact on SILECs of having to comply with the TIB Order during a period critical to the companies' efforts in preparing for Year 2000 computer compliance (Y2K) matters; and (3) failed to recognize that SILECs will incur tremendous regulatory, managerial and economic burdens in having to be in compliance by July 26, 1999.

In the TIB Order, the FCC declared its authority under Section 201(b) all carrier charges, practices, classifications and regulations "for and in connection with" interstate communications services must be just and reasonable. The FCC declared that Section 258 of the 1996 Telecommunications Act, relating to interstate and intrastate slamming, authorizes the FCC to adopt "verification" rules to combat the practice of slamming. However, in its implementation of Sections 201(b) and 258 in this matter, the Commission must keep in mind that the TIB Order's

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[3]USTA Comments at 1, 3-8.

requirements affect different classes of small entities, which include SILECs. It is also necessary to balance these interests against all affected regulated carrier interests in this matter, only after a complete detailed analysis of the impact that the relevant TIB Order requirements will have on each class of small entities. The congressional intent of the RFA was for federal agencies to use regulatory flexibility analysis as a tool, during its rulemaking process, to reach a well-founded decision based on legal, policy, and factual factors, as well as to minimize the economic impact on small entities.[4] The TIB Order falls short of this goal.

Pursuant to the TIB Order, telephone bills must: (1) clearly identify the name of the service provider associated with each charge; (2) separate charges by service provider; and (3) provide a conspicuous notification of any change in service provider, i.e., new service providers are to be highlighted to signal slamming to the consumer. However, with regard to the latter matter, the FCC said it had declined to adopt its TIB Order to require small entities or SILECs to indicate each new service ordered by a customer each month. The requirement is part of the highlighting requirements contained in the Commission's TIB Order at ¶ 35.

Notwithstanding that particular exemption, SILECs must ensure that telephone bills contain full and non-misleading descriptions of service charges. Services included on the bill must be accompanied by a brief and plain descriptions of the service charges and the services rendered. Telephone bills must clearly and conspicuously indicate whether nonpayment of a particular charge will result in disconnection of basic telephone service. Telephone bills must also disclose any information the consumer may need to inquire or contest charges. Thus,

[4]Regulatory Flexibility Act, Pub. L. No. 96-354, Section 2(b).

carriers must prominently display a toll-free number for customers to call, including relevant billing agent, clearinghouse, or other third party numbers.

As stated in the order, carriers are expected to implement the TIB Order requirements thirty days after publication in the Federal Register. The Federal Register published the rules on June 25, 1999.[5] Thus, covered carriers have until July 26, 1999 to be in compliance with the TIB Order.[6] Particularly given the short implementation time frame and other shortcomings which allegedly disadvantage SILECs in the TIB Order, USTA is concerned about the impact of the TIB Order's requirements on SILECs, particularly because the FCC has incorporated the requirements in its rules and can enforce them against SILECs for non-compliance.

II. ARGUMENT

A. The FCC failed to comply with its obligations under the Regulatory Flexibility Act in its failure to consider that SILECs are small businesses under the U.S. Small Business Administration's definition.

In the IRFA accompanying the TIB Order, the FCC failed to afford such carriers the complete consideration of its obligations under the Regulatory Flexibility Act with respect to lessening regulatory burdens and providing regulatory flexibility to SILECS as small businesses. In its consideration of the TIB Order, the FCC claims to have taken adequate steps to minimize the economic impact of its proposed rules on SILECs. (¶102). Specifically, the FCC declined to

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[5]*See* FCC proceeding regarding "Truth-in-Billing and Billing Format" [CC Docket 98-170; FCC 99-72], 64 Fed. Reg. 34487-34498 (Jun. 25, 1999)(to be codified at 47 C.F.R. Part 64, Subpart U, Subsections 64.2000, 64.2001).

[6]To the extent that the action by OMB in declining to approve the FCC's request for emergency approval pursuant to the PRA (see Appendix A, of this instant USTA filing) may have temporarily stayed the implementation date of the TIB Order, the FCC should clarify this matter for the public in a public notice to this effect.

require these carriers to indicate each new service ordered by a customer each month; and to require those carriers to provide a detailed breakdown of their costs incurred due to federal regulatory action. Although the FCC did not exempt the relevant carriers from the other TIB Order requirements, it said it will allow carriers considerable discretion to satisfy their obligations in a manner that best suits their needs and those of their customers.[7] In that regard, the FCC felt it had minimized the economic impact on small carriers to the greatest possible extent. However, USTA SILEC members' realities are not consistent with that view.

The congressional intent of the RFA was for Federal agencies to use regulatory flexibility analysis as a tool, during its rulemaking process, to reach a well-founded decision based on legal, policy, and factual factors, as well as to minimize the economic impact on small entities.[8] The RFA was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purpose, they do not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulations[9]. The Commission is required to prepare a regulatory flexibility analysis as a matter of law pursuant to the RFA when there is a "significant economic impact on a substantial number of small entities.[10] The major objectives of the RFA are: (1) to increase agency awareness and understanding of the impact of their regulations on small business; (2) to require that agencies communicate and explain their

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[7]TIB Order at ¶102.

[8]Regulatory Flexibility Act, Pub. L. No. 96-354, Section 2(b). Also, *see generally*, Exec. Order No. *12866, 58 F. Reg 51735 (1993) reprinted in* 5 U.S.C § 601 (1998).

[9]*See* U.S.C. Section 601(4)-(5).

[10]S*ee* U.S.C. Section 605.

findings to the public; and (3) to encourage agencies to use flexibility and provide regulatory relief to small entities where feasible and appropriate to its public policy objectives."[11]

On March 29, 1996, President Clinton signed SBREFA into law, amending, *inter alia,* the RFA to allow judicial review of an agency's compliance with the RFA.[12] Notwithstanding the availability of judicial review under SBREFA, courts have consistently held that failure to undertake a proper regulatory flexibility analysis could result in arbitrary and capricious rulemaking in violation of Section 706 of the Administrative Procedure Act (APA).[13] Analysis conducted under the RFA is to be included in the agency record of rulemaking when judicial review of a final agency rule takes place. As result of the inclusion of regulatory flexibility analysis in agency records being subject to judicial review, an improperly conducted analysis under the RFA may be grounds for overturning the rule as arbitrary and capricious under the APA.

USTA understands that the purpose of the RFA is not to provide preferential treatment for small businesses, nor does it require agencies to adopt regulations that impose the least burden on small entities or mandate exemptions for small entities. Rather, the RFA establishes an analytical process for determining how public issues can best be resolved without erecting barriers to competition. Congress's intent in enacting the RFA and SBREFA was to provide a level playing field for small business, not an unfair advantage. To this end, the RFA requires the

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[11]*See generally*, Exec. Order No. *12866, 58 F. Reg 51735 (1993) reprinted in* 5 U.S.C § 601 (1998).

[12]Citation omitted.

[13]*Tompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *see also Small Refiner lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 538 (D.C. Cir. 1983).

FCC to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing the burden on small entities.[14] The record does not support the FCC's actions.

Under 5 U.S.C. §6111, added to the RFA by SBREFA, a small entity that is adversely affected or aggrieve by a final agency rulemaking may seek review of the agency's non-compliance with certain provisions of the RFA.[15] Furthermore, judicial review under the RFA can be had concerning the Section 601 of the RFA addressing the SBA's definitions of small entity.[16] Given the FCC does not define SILECs as being small businesses, SILECs do not possess the standing to even contest this matter. The FCC may have therefore foreclosed a court challenge to SILECs in this matter. Surely, this would not be consistent with congressional intent. Thus, it is incumbent for the FCC to take appropriate and immediate action to ensure that SILECs' rights are protected.

Given the SBA's recent clarification of its definition of small business concerns includes SILECs, USTA believes the FCC should clarify whether it will reconcile its definition of small business with that of the SBA's in this matter. To the extent the FCC reconciles its definition, but opts against a total SILEC exemption in this matter, USTA believes the FCC should reconsider the timing of its compliance requirements. In that regard, the FCC should evaluate

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[14]5 U.S.C. Section 604.

[15]Citation omitted.

[16]*Northwest Mining Ass'n v. Babbitt, 5 F. Supp. 2d 9 (D.D.C. 1998)*

whether any delay should be occasioned by virtue of the need for these entities to devote resources toward preparation for Y2K. USTA believes the FCC has the ability to find good cause shown by these arguments made here and should opt, *sua sponte, to* hold the Order in abeyance until March 2000, as to the SILECs. At minimum, USTA believes the FCC should reconsider the economic impact on SILECs to implement those provisions the FCC requires SILECs to make.

1. The FCC should reconsider its definition of small businesses and reconcile it with that of the Small Business Administration.

(a). SILEC's disposition under the TIB Order requirements should be completely reconsidered.

Until the Commission resolves certain matters after concluding the further notice on the issue of the FCC's present IRFA, small businesses/small SILECS are being placed entirely at risk. If there is a possibility that the FCC may exempt small SILECS from the TIB Order at the conclusion of the further notice, it would be a bizarre requirement for the FCC to require SILECs to comply with the TIB Order, only to later grant an exemption. Absent the full opportunity to comprehensively focus on SILEC matters prior to liability attaching, SILECs could needlessly be placed in a vulnerable posture and potentially exposed to irreparable harm by virtue of the TIB Order.

In addressing the IRFA, USTA objects to the FCC's proposed actions in ¶108 (description and estimate of the number of small entities to which the proposed rules will apply) The FCC said it does not consider small SILECS as small entities or small businesses. The FCC in ¶81 of the May 11th TIB Order states that:

Although some affected incumbent LECs may have 1,500 or fewer employees, we do not

> believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and by definition are not small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small SILECS within this analysis and use the term small SILECS to refer to any SILECS that arguably might be defined by the SBA as a small business concerns.

TIB Order at ¶81. Further, the FCC has said that neither it nor the Small Business Administration has developed a definition for small providers of locale exchange services. TIB Order at ¶84.

However, following the FCC's May 11, 1999 release of the TIB Order, the SBA's Office of Advocacy, by letter dated May 27, 1999 (included in this instant pleading as part of Appendix A), informed the FCC of the SBA's definition of small business/entity.[17] Section 3 of the Small Business Act provides, according to the SBA Letter, that a small business is one that is independently owned and operated and not dominant in its field of operation.[18] The SBA has determined that dominance in a field of operation is determined on a national basis.[19] Further, the SBA provides that:

> Small ILECs are not dominant in the national telecommunications industry and qualify as small entities. Treating small ILECs as small entities is in keeping with the spirit of the RFA [Regulatory Flexibility Act of 1980] and the Telecommunications Act of 1996. Compliance burdens such as additional record keeping requirements that are inconsequential to the large ILECs can cripple a smaller ILECS. Moreover, small ILECs are not likely to have the market share or market power of the Regional Bell Operating Companies and GTE. Regulations that are necessary to prevent a large ILEC from exerting undue influence on the market are not necessary for a small ILEC. Regulatory

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[17] Letter from Jere W. Glover, Chief Counsel for the U.S. Small Business Administration to William E. Kennard, Chairman, Federal Communications Commission (May 27, 1999)(SBA Letter).
[18] 15 U.S.C. § 632(a).
[19] 13 C.F.R. § 121.102(b).

> flexibility was implemented by Congress to combat this sort of uneven regulatory burden and to encourage agencies to implement regulations that address only those entities that are the source of the problem.

SBA Letter at 2-3. In that letter, the SBA requested that the FCC amend its regulatory flexibility analysis to comply with the SBA's small business definition; and argued that the FCC must include SILECs within the definition of small business in future analysis to comply with the requirements of the RFA. The SBA Letter addressed specific cases that did not include TIB (e.g., Broadband Order; Primary Lines Order; and Reciprocal Compensation Order). The SBA's Letter also followed the TIB Order, but did not mention this proceeding, specifically. USTA believes it is appropriate and necessary for the FCC to immediately recognize that the SBA's definition of small businesses encompasses SILECs in this matter.[20]

B. The FCC failed to fully consider the OMB's recommendations: that the FCC consider the impact on SILECs of having to comply with the TIB Order during a period critical to the companies' efforts in preparing for Year 2000 computer compliance (Y2K) matters.

The FCC should reconsider the impact on carriers of having to reconfigure their billing systems to accommodate the "deniable/non-deniable" requirements and all other burdensome requirements on the bases that such changes to the bill may be difficult to accommodate in light

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[20]In a letter to FCC Chairman William Kennard on June 21, 1999, Roy Neel, President and Chief Executive Officer of USTA agreed with the SBA's conclusions that SILECs should be considered small entities under the RFA. The FCC has always considered SILECs an exception to this treatment on the grounds that they are dominant providers of telecommunications services in their own areas, and therefore subject to dominant carrier regulation. As reiterated here, Neel believes that SILECs are not dominant providers of telecommunications services on a nationwide basis and that the regulatory requirements imposed on them should reflect this fact. Non-dominant status would result in less regulation and lower costs for small local phone companies, which the SBA defines as companies with fewer than 1,500 employees. Letter from Roy Neel, USTA President and CEO to Mr. William Kennard, Chairman, Federal Communications Commission (May 4, 1999)(Contained in Appendix A).

of Y2K matters. By necessity, a number of carriers may have to impose moratoriums on further changes to bill formats after a time certain in order to avoid further complications to the billing system and to preserve system integrity and reliability. The FCC should reassess the impact from Y2K, and take appropriate action to immediately address this concern.

Significantly, OMB recommended that the Commission allow all carriers sufficient time to address their necessary Y2K-related modifications to their computer systems as well as modifying their billing systems to meet any new requirements.[21] However, the Commission rejected this recommendation.[22] Following the release of the TIB Order, OMB Director Jacob J. Lew, released on May 14, 1999, OMB Memorandum 99-17 to the heads of federal executive department and agencies. That Memorandum addresses "Minimizing Regulatory and Information Technology Requirements That Could Affect Progress Fixing the Year 2000 Problem". That Memorandum provides:

> As you know, the Year 2000 problem presents a major challenge to each of our organizations as well as to the many organizations with whom we relate. As your agency continues to make progress on this problem, it is important that you consider the potential effect of regulatory actions or changes to information technology (IT) systems on the Year 2000 readiness of regulated entities and your agency. To the extent you can do so while meeting your statutory responsibilities, your agency should not establish requirements that would have an adverse effect on that readiness, if such requirements can be delayed or if there is an alternative that would not have an adverse effect.
>
> While I understand the importance of agencies achieving their regulatory goals, it is important that these goals be timed in such a way that time-sensitive work on the Year 2000 problem not be jeopardized. Implementing a regulation often requires changes to the information systems of regulated entities. Accordingly, before issuing a final regulation, please use your existing process for reviewing regulations to consider the effect of the regulation on the Year 2000 readiness of regulated entities and consider

[21]TIB Order at ¶76.
[22]Id at 77.

> alternatives to minimize that effect, such as postponing the effective date of the regulation. I have asked Desk Officers in the Office of Information and Regulatory Affairs to assist your Regulatory Policy Officer on this matter and to provide assistance in assessing any effects on Year 2000 readiness in reviewing agency rules. . . .

http://www.cio.gov/minregi.htm. Based on this directive, the FCC should allow carriers to delay implementation of the highlighting and deniable/non-deniable requirements and other major format, software or systems changes until the period in which the Y2K efforts are in the clear, i.e., by April 1, 2000. Y2K periods could potentially trigger in some software/systems in September 1999, on or around January 1, 2000, and on through to March 2000, since February 2000 is a leap year. Further, SILECs and other industry carriers may be subject to separate state regulatory requirements concerning Y2K preparatory/contingency planning matters.

C. The FCC failed to recognize that SILECs will incur tremendous regulatory, managerial and economic burdens in having to be in compliance with the TIB Order.

The OMB sought a SILEC exemption in this proceeding. See TIB Order at ¶ 76: OMB recommends that [the FCC] not impose undue burdens on wireless providers and small wireline services; and urges that the flexibility be given to small companies that may experience significant cost and managerial issues related to implementation of billing requirements." Despite OMB's recommendations, the FCC declined to adopt many of the proposals in its Notice that would be most costly for small entities and small incumbent LECs to implement.[23] Specifically, it did not require that these entities indicate each new service ordered by a customer each month; or that such carriers provide a detailed breakdown of their costs incurred due to federal regulatory action. Instead, the FCC said it permitted these carriers to use their discretion to

[23]TIB Order ¶102.

describe the nature and purpose of these charges to their customers. On the other hand, the FCC will still require compliance as to all other matters by small incumbent LECs. However, the FCC said it will allow carriers considerable discretion to satisfy their obligations in a manner that best suits their needs and those of their customers, thus minimizing the economic impact on small carriers to the greatest possible extent.

Furthermore, the FCC failed to provide a cost-benefit analysis assessing the costs of compliance for SILECs to comply with the applicable provisions of the FCC TIB Order. Given that SILECs have a much smaller rate base than larger SILECs, customers of small ILECs may be forced to bear a heavier burden for paying for improvements needed to comply with the TIB Order than customers of other carriers. Some SILECs companies report that they may have to stop billing for long-distance companies (IXC) in order to comply with the Order at n.126, because adding language to the bill as required by the IXC might conflict with the SILECs' character limitations. As a result, SILECs face loss of revenues from having to decline an IXC's business. One SILEC USTA member estimated that the cost of reprogramming its system to specify deniable or nondeniable charges would cost the company $15,000.00 and take approximately 120 days to complete. Another expressed concerns about the extra postage that may be required as a result of having to add changes to the bill. For some SILECs these issues are considerable and should be taken into account.

While USTA believes the FCC was deficient in determining the economic impact on SILECs of the relevant TIB requirements , USTA urges the FCC to take appropriate measures to immediately rectify these problems in this matter. To that extent, the FCC may need to take a relevant sampling of the industry. Additionally, USTA urges the FCC to address the questions raised by OMB in OMB's July 1999 action taken in response to the FCC's request for emergency approval by OMB its action in this matter. (See Appendix A of this instant pleading.)

III. CONCLUSION

WHEREFORE, USTA respectfully urges that the Commission take the necessary action requested by USTA herein.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

BY Julie E. Rones

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APPENDIX A

From: <Timothy_R._Fain@omb.eop.gov>
To: USTAORG.USTAPO(Jrones),USTA.SMTP("eric.menge@sba.g...
Date: Fri, Jul 2, 1999 8:29 PM
Subject: USTA Comments on Truth in Billing

Judy:

I disapproved the Truth in Billing information collection (3060-0857) on July 2, 1999. Because 5 CFR 1320 requires OMB to act on an Emergency Request by the date requested, I decided to disapprove this collection pending resolution of the issues I raised in the email I sent to all of the recipients on this list on July 1.

The terms of clearance in the Notice of OMB Action for this item state OMB's issue with this collection. The FCC needs to establish some ability for small and mid-size carriers to obtain relief (either using a waiver or delay in implementation date) from the requirements in this collection so that carriers can finish Y2K remediation efforts unhindered.

I recommend that the FCC work with industry to resolve this -- then resubmit this as an Emergency. A rulemaking of such impact to the industry should not have been submitted to OMB for clearance in a week without at least an opportunity for affected parties to at least read and comment on the Report and Order PRA requirements.

Tim Fain

CC: USTA.SMTP("Virginia_A._Huth@omb.eop.gov","Jefferso...

From: <Timothy_R._Fain@omb.eop.gov>
To: USTAORG.USTAPO(Jrones),USTA.SMTP("eric.menge@sba.g...
Date: Thu, Jul 1, 1999 2:45 PM
Subject: USTA Comments on Truth in Billing

Introduction
The FCC has requested emergency approval of revisions to 3060-0857 that would require that almost all (3099) service providers in the US to make substantive changes to the bills they send their customers. These changes are intended to improve consumer awareness regarding where they are getting the services from, identify any new services, and provide a toll-free telephone contact for consumers to call regarding inquiries. These rules take effect 30 days after publishing in the Federal Register -- and are contingent upon OMB approval. FCC has asked for approval by July 2nd.

The comments of the US Telecommunications Association seem to chiefly focus on FCC's definition of "small business" with regard to telecommunications providers. As USTA's letter points out, the Small Business Administration is challenging the FCC's position that as dominent providers in their local markets, telecommunications firms that employ a limited number of staff do not meet the FCC's criteria for being a "small business." SBA takes a broader view, considering these firms as players in an overall national industry. USTA supports SBA's position on this.

While this debate clearly has implications for Regulatory Flexibility Analysis and other legal requirements, my scope of involvement is limited to the narrow question of whether the Truth in Billing requirements proposed in CC Docket 98-170 and whose approval FCC is requesting in information collection OMB 3060-0854 should be approved by OMB.

As far as the overall requirements contained in the rulemaking, I find them to be generally straight-forward and reasonable. I do agree with Commissioner Powell on the potential ability of competition to give the consumer true choices regarding selecting and maintaining an ongoing relationship with their carrier -- a decision that can be based on the customer's perception of the carrier as being a "truthful" provider. In this vein, small carriers (where they are subject to competition) will have to respond to the billing efforts being undertaken by carriers such as Ameritech and Bell South. Other small carriers, not subject to competition, will not face "billing simplification" pressures unless they come from an external source such as this rule.

My concerns lie with the implementation and its schedule.

OMB Concerns
In its Notice of Action on December 23, 1998, OMB requested that the FCC allow companies sufficient time to address their Y2K compliance issues. OMB's position on this issue was further clarified in OMB Memorandum 99-17.

The FCC maintains that it debated the possible effect of our Truth-in-billing principles and guidelines on carriers' Y2K remediation efforts during the course of the rulemaking. The FCC considered and rejected carriers' arguments that it should not adopt rules because of their potential effect on Y2K efforts. Based in part on carriers' comments generally, the FCC also adopted rules that were much less burdensome than those originally proposed in the Notice. Commissioner Powell (head of the FCC's Y2K efforts) concurred in the item. While the FCC points out that OMB Memorandum 99-17 concerning Y2K was issued almost one month after the Commission adopted the proposed rules, OMB specifically identified this as an issue in December.

The FCC believes that it considered the effect of its proposed rules on Y2K, and adopted only those rules thought absolutely necessary to protect consumers, and where the burden on carriers would not outweigh the benefit to consumers. The FCC maintains that the proposal ultimately adopted was nearly identical to a compromise set of principles that USTA suggested in their comments.
OMB shares USTA concerns about the required timeframe for making these changes and the implications they have for the service providers -- particularly their Y2K efforts. Another concern is the cost of these changes. Assuming a smaller rate base, will smaller consumers pay more for these "improvements" than the customers of larger providers?

Specific Questions
1. Is there a waiver process for carriers up to a pre-determined size? What is the basis for granting such waivers? How long can they be granted a waiver?

2. What firms are now required to meet these requirements? Every common carrier except CMRS? All wireline? All wireless? What recourse does a person who feels that a wireless carrier has misleading bills have?

3. When will the implications of the descriptions portion of the FNPRM be known. Why should carriers have to implement these requirements in steps? Shouldn't the rulemaking be completed so as to allow carriers to implement the billing changes in one step?

4. I remain concerned about the implications for small carriers and their Y2K compliance efforts. I am particularly disturbed by the FCC's decision to require implementation within 30 days (assuming approval by OMB) as small carriers struggle with Y2K issues. How is the rulemaking consistent with page 25 of the FCC's own "Y2K Communications Sector Report" that states "Medium and small carriers that serve many rural and insular areas lag somewhat behind, and generally will not complete their full remediation until the very end of 1999. The tight time schedule is cause for some concern."

5. What alternatives are there to allow small carriers to delay their implementation date until their Y2K efforts are completed?

6. Why wasn't this collection allowed the full PRA comment period -- rather than seeking an emergency OMB approval with no public comment? What is the lost utility to consumers for a one to two month (minimal) delay in these requirements.

7. Has the FCC specifically examined the new service highlight item raised

by USTA in the last paragraph on page 6 of 10 of their letter? Does this requirement only apply to large carriers? What are the moratoriums that are mentioned?

8. How reasonable is it to expect that all of these requirements can be met in 30 days? Has the industry, or groups such as USTA, had sufficient time to assess and develop tools to allow their members to respond to these requirements? What analysis did the FCC do to determine the adequacy of the 30 day window -- and the cost burden estimates?

9. What general steps does the FCC think a representative large and small carrier will need to take to be reasonably compliant with these rules.

I would appreciate the FCC's thoughts on these issues.

Thanks!

Tim Fain

CC: USTA.SMTP("Virginia_A._Huth@omb.eop.gov","Jefferso...

June 28, 1999

BY TELECOPIER to (202) 395-5167
Timothy Fain, Desk Officer
Executive Office of the President of the United States
OFFICE OF MANAGEMENT AND BUDGET
Office of Information and Regulatory Affairs
Information Policy and Technology Branch
New Executive Office Building, Rm. 10236
Washington, D.C. 20503

Regarding OMB Number 3060-0854: **COMMENTS TO OMB REGARDING THE FCC'S FINAL PAPERWORK REDUCTION ACT OF 1995 ANALYSIS AS IT PERTAINS TO THE FCC'S TRUTH-IN-BILLING AND BILLING FORMAT (CC Docket 98-170).**

Dear Mr. Fain:

On behalf of relevant small Incumbent Local Exchange Carrier (SILECs) Members and, where relevant, local exchange carrier Members generally, the United States Telephone Association (USTA) through counsel, respectfully submits these comments on the Federal Communications Commission's (FCC or Commission) *First Report and Order and Further Notice of Proposed Rulemaking* [*In re* Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, (rel. May 11, 1999)(TIB Order)(also, the further notice of proposed rulemaking is hereinafter referred to as "FNPRM)]in the above-captioned proceeding. In paras. 105 and 108 of the TIB Order, *inter alia,* the FCC requested public comments on its present Initial Regulatory Flexibility Analysis (IRFA); and the Paper Reduction Act at para. 112.

USTA files this action to protect the interest of its SILECs and ILECs in addressing issues relevant to the Commission's statutory actions affecting this interest with respect to its legal obligation to comply with the Paperwork Reduction Act of 1995, Pub. L. 104-13 (PRA). USTA is concerned about the existence or accuracy of the Commission's burden estimates; and whether the proposed requirements would create greater burdens on the industry than the intent of the FCC's order is designed to cure. Accordingly, USTA requests relevant OMB consideration and action concerning the FCC's efforts to establish mandatory, broad principles and guidelines for "truth-in-billing," in order to ensure consumers receive thorough, accurate, and understandable bills from carriers.

USTA believes the FCC **(1) failed to consider that SILECs are small businesses under**

the Small Business Administration's definition. Because the FCC could reconcile its definition with that of the SBA after concluding the FNPRM which effectively might result in SILECs being exempt from the TIB Order; and because SILECs in advance of the action by the FCC on the FNPRM are potentially exposed to non-compliance, especially due to the immense burdens this could place on SILECs, OMB should not approve the FCC's actions under PRA. The FCC failed to afford such carriers the complete consideration of the TIB Order's requirements, notwithstanding the exemption it considered as to two specific provisions of the TIB Order at para. 102. In that paragraph, the FCC sought to take steps to minimize the significant economic impact of the TIB Order on small entities and SILECs by including consideration of the significant alternatives considered. Therein, the FCC declined to require these carriers to indicate each new service ordered by a customer each month; and declined to require those carriers to provide a detailed breakdown of their costs incurred due to federal regulatory action, and instead permit carriers to use their discretion to describe the nature and purpose of these charges to their customers. Although the FCC did not exempt the relevant carriers from the other TIB Order requirements, it said it "[will] allow carriers considerable discretion to satisfy their obligations in a manner that best suits their needs and those of their customers, thus minimizing the economic impact on small carriers to the greatest possible extent." Id.; **(2) The FCC failed to fully consider, as recommended by the OMB, the impact on SILECs of having to comply with the TIB Order during a period critical to the SILECs' and all of the LECs' efforts in preparing for Year 2000 computer compliance (Y2K) matters. (3) The FCC failed to recognize that SILECs will incur tremendous regulatory, managerial and economic burdens in having to be in compliance by July 26, 1999 and beyond. In the latter respect, the FCC should also reconsider the economic impact on all carriers before compliance can be achieved.**

In the TIB Order, the FCC declared its authority under Sections 201(b): all carrier charges, practices, classifications and regulations "for and in connection with" interstate communications services must be just and reasonable. The FCC declared that Section 258, relating to interstate and intrastate slamming, authorizes the FCC to adopt "verification" rules to combat the practice of slamming. The TIB Order does not apply to wireless carriers, except in very limited instances (not articulated herein)(However, the Commission's May 28, 1999, "Errata", may be inconsistent with the establishment of an exception for wireless carriers.) However, in its implementation of Sections 201(b) and 258 in this matter, the Commission must keep in mind that the proposed rules affect different classes of small entities, which include SILECs. It is also necessary to balance these interests against all affected regulated carrier interest in this matter, only after a complete detailed analysis of the impact that the relevant TIB Order requirements will have on each class of small entities.

Pursuant to the TIB Order, telephone bills must: (1) clearly identify the name of the service provider associated with each charge; (2) separate charges by service provider; and (3) provide a conspicuous notification of any change in service provider, I.e., new service providers are to be highlighted to signal slamming to the consumer. However, with regard to the latter matter, the FCC said it had declined to adopt its TIB Order to require small entities or SILECs to indicate each new service ordered by a customer each month. The requirement is part of the highlighting requirements contained in the Commission's TIB Order at para. 35. Notwithstanding that particular provision SILECs must ensure that telephone bills contain full and non-misleading descriptions of service charges; services included on the bill must be accompanied by a brief and plain descriptions of service charges; services included on the bill must be accompanied by a brief and plain description of the services rendered; and telephone bills must clearly and conspicuously indicate whether nonpayment of a particular charge will result in disconnection of basic telephone service. Additionally, telephone bills must clearly and conspicuously disclose any information that the consumer may need to inquire or contest charges. In that regard, the FCC requires that carriers prominently display toll-free numbers for each service provider which customers can call to question charges. These numbers may include numbers for billing agent, clearinghouse, or other third party.

Carriers are expected to implement the TIB Order requirements as stated in the order thirty days after publication in the Federal Register. The Federal Register published the rules on June 25, 1999 [*see* Federal Communications Commission proceeding regarding "Truth-in-Billing and Billing Format" [CC Docket 98-170; FCC 99-72], 64 Fed. Reg. 34487-34498 (Jun. 25, 1999)(to be codified at 47 C.F.R. Part 64, Subpart U, Subsections 64.2000, 64.2001)]. Thus, covered carriers have only until July 26, 1999 to be in compliance with the TIB Order. Particularly given the short implementation time frame, USTA is concerned about the impact of the TIB Order's requirements on SILECs, particularly because the FCC has incorporated the requirements in its rules and can enforce them against ILECs for non-compliance.

USTA believes given the SBA's recent clarification of its definition of small business concerns includes SILECs, that the FCC should clarify whether it will reconcile its definition of small business to include small ILECs in the FCC's definition of small businesses as stated in the Order. Moreover, USTA believes the FCC should reconsider the timing of its compliance requirements and whether any delay should be occasioned by virtue of the need for these entities to devote resources toward preparation for Y2K. USTA nonetheless believes that OMB, to the extent appropriate, should recommend that the FCC hold the Order in abeyance until March 2000, as to the SILECs and other Billing and Collection LECs. The FCC said in the TIB Order at para. 108 that small entities would possibly be affected by the proposal made in this Further Notice. Therefore, OMB should point out the unreasonableness of the fact that SILECs can not apply for an exemption/waiver before the FCC has defined them as having small business/entity standing under the TIB Order. Further, USTA believes the FCC should reconsider the economic impact on SILECs to implement those provisions the FCC requires SILECs to make.

1. **The FCC failed to consider that SILECs are small businesses under the Small Business Administration's definition. Because the FCC could reconcile its definition with that of the SBA after concluding the FNPRM which effectively might result in SILECs being exempt from the TIB Order; and because SILECs in advance of the action by the FCC on the FNPRM are potentially exposed to non-compliance, especially due to the immense burdens this could place on SILECs, OMB should not approve the FCC's actions in light of the PRA.**

SILECs' disposition under the TIB Order requirements should be completely reconsidered. The FCC should grant small ILECs a provisional suspension of the entire TIB requirements on the basis of good cause shown. Until the Commission resolves certain matters after concluding the FNPRM on the issue of the FCC's present IRFA, small businesses/small ILECs are being placed entirely at risks. Further, a possible need to reconcile the FCC's definition of small business concern with that of the SBA's recent interpretation may justify reconsideration and suspension to avoid exposing SILECs to liability for non-compliance. Given that SILECs may be deemed exempt from the TIB at the conclusion of the further notice, it would be a bizarre requirement for SILECs to have had to be in compliance with the TIB Order, only for the FCC to later say it has determined exemption applies. Therefore, absent the full opportunity to comprehensively investigate and determine significant SILEC matters prior to the required implementation deadline, SILECs are needlessly made vulnerable and exposed to irreparable harm by virtue of the TIB Order. In this manner, at minimum, OMB should recognize that the FCC put the cart before the horse to the alleged disadvantage of SILECs. This is critical and must be remedied. Again, a waiver for SILECs would be unworkable to the degree that the FCC has not defined SILECs as being small businesses or small entities, as of this juncture, so that standing to apply for such a waiver is not currently available given the FCC stance on the definition of small business.

USTA objects to the FCC's proposed actions in para. 108 (description and estimate of the number of small entities to which the proposed rules will apply). The FCC said it does not consider SILECs as small entities or small businesses. The FCC in ¶81 of the May 11th TIB Order states that:

> Although some affected incumbent LECs may have 1,500 or fewer employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term "small ILECs" to refer to any ILECs that arguably might be defined by the SBA as "small business concerns."

TIB Order at ¶81. Further, the FCC said that neither it nor the Small Business Administration has developed a definition for small providers of locale exchange services. TIB Order at ¶ 84.

However, following the FCC's May 11th released TIB Order, the U.S. Small Business Administration's (SBA) Office of Chief Counsel for Advocacy, by letter dated May 27, 1999 (included in this instant pleading as Attachment A), informed the FCC of the SBA's definition of small business/entity.[1] Section 3 of the Small Business Act provides, according to the SBA Letter, that a small business is one that is independently owned and operated and not dominant in its field of operation [15 U.S.C. § 632(a)]. The SBA has determined that dominance in a "field of operation" is determined on a national basis [13 C.F.R. § 121.102(b)]. Further, the SBA provides that:

> Small ILECs are not dominant in the national telecommunications industry and qualify as small entities. Treating small ILECs as small entities is in keeping with the spirit of the RFA [Regulatory Flexibility Act of 1980] and the Telecommunications Act of 1996. Compliance burdens such as additional record keeping requirements that are inconsequential to the large ILECs can cripple smaller ILECS. Moreover, small ILECs are not likely to have the market share or market power of the Regional Bell Operating Companies and GTE. Regulations that are necessary to prevent a large ILEC from exerting undue influence on the market are not necessary for a small ILEC. Regulatory flexibility was implemented by Congress to combat this sort of uneven regulatory burden and to encourage agencies to implement regulations that address only those entities that are the source of the problem.

SBA Letter at 2-3. Therein, the SBA requested that the FCC amend its regulatory flexibility analysis to comply with the small business definition as defined by the SBA; and argued that the FCC must include small ILECs within the definition of small business in future analysis to comply with the requirements of the RFA. The SBA Letter had addressed specific cases which did not include TIB (e.g., Broadband Order; Primary Lines Order and Reciprocal Compensation Order). The SBA's Letter also followed the TIB Order, but did not mention this proceeding, specifically. Thus, USTA believes it is appropriate for the FCC to recognize the SBA's definition of small businesses encompasses small ILECs in this matter. In that regard, the FCC needs to specifically reconsider this matter and determine a definition consistent with that of the SBA.

In a letter to FCC Chairman William Kennard on June 21, 1999, Roy Neel, President and Chief Executive Officer of USTA agreed with the SBA's conclusions that SILECs should be considered "small entities" under the 1980 RFA.[2] In the past, the FCC has considered small ILECs an exception to this treatment on the grounds that they are dominant providers of telecommunications services in their own areas, and therefore subject to dominant carrier regulation. In his Letter, Neel said that SILECs are not dominant providers of telecommunications services (as the SBA also has established), and the regulatory requirements imposed on them should reflect this fact. Non-dominant status would mean less regulation and lower costs for small local phone companies that could be passed through to its customers. SILECs are defined by the SBA as small

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[1] Letter from Jere W. Glover, Chief Counsel for the U.S. Small Business Administration to William E. Kennard, Chairman, Federal Communications Commission (May 27, 1999)("SBC Letter").

[2] Letter from Roy Neel, USTA President and CEO to Mr. William Kennard, Chairman, Federal Communications Commission (May 4, 1999)(Attachment B).

businesses or entities that have fewer than 1,500 employees, are investor owned and operated and non-dominant on a national basis.

USTA calls on the OMB to ensure that the FCC clarify in the TIB docket application of the SBA's definition of small businesses and/or small entities to include SILECs; and that the FCC be required to do so in a manner that entails congnizance of FNPRM timing factors and liability time-sensitive triggers.

(2) The FCC failed to fully consider, as recommended by the OMB, the impact on SILECs of having to comply with the TIB Order during a period critical to the companies' efforts in preparing for Year 2000 computer compliance (Y2K) matters.

OMB should requests that the FCC reconsider the economic and relevant impacts on carriers of having to reconfigure their billing systems to accommodate the "deniable/non-deniable" requirements on the bases that such changes to the bill may be difficult to accommodate in light of the time and resources being dedicated to Y2K matters. Some SILECs may have had to impose moratoriums on further changes to bill formats and many other computer-related projects to be able to accomplish Y2K system changes after a time certain. Such a course may necessarily conflict with their obligations under the TIB. As a business judgment matter, such moratoriums imposed by SILECs may have been deemed necessary in order to avoid further complications to the billing system and to preserve system integrity and reliability in light of Y2K issues. The FCC should reassess its defacto de-priority of critical Y2K work for implementing what may be construed as marginal gains in customer benefits from TIB. This reassessment needs to be done and appropriate action needs to be taken, especially since OMB has required federal agencies to be deferential to the entities they regulate in light of Y2K matters needing priority status in particular circumstances.

Moreover, OMB should ask that the FCC assess the cost burdens on LECs, where relevant, from having to specifically identify, isolate and highlight new service providers from month to month. This has generated considerable USTA Member internal complaints as to the reasonableness of the demand, especially because carriers have never done this and would have to restructure operations, entirely to accommodate this requirement. While some USTA members believe this requirement should be shifted to those companies the LEC bills for to determine whether the service is new, one ILEC member provided that other carriers may not have a database that enables provision of the information. Thus, the entire burden may fall on the Billing and Collection LEC to determine new service providers from month to month. New providers appear routinely on the bill today, especially with respect to "dial-around" calls. This burden being placed only on the B&C LEC would be inequitable and should be considered by OMB under PRA analysis. A few SILECs informed USTA that Y2K compliance would be hampered by having to address these kinds of TIB matters. This has been a complaint by the large ILECs as well. A number of large ILECs are participating in various Y2K forums and have indicated moratoriums will apply to billing at a time certain. Therefore, OMB should point this matter out to the FCC so the FCC will consider holding the TIB matter in abeyance entirely until after March 2000. Recognizably, to the extent that SILECs have been exempt from the highlighting requirement, this may not be relevant. However, to the extent it applies for large ILECs, these USTA members shall opt to preserve the opportunity to take all appropriate action before the FCC in challenging both the highlighting and "deniable/non-deniable" TIB Order requirements in all relevant manners they deem appropriate.

Significantly, OMB recommended that the Commission allow all carriers sufficient time to address their necessary Y2K-related modifications to their computer systems as well as modifying their billing systems to meet any new requirements." TIB Order at ¶76. However, the Commission rejected this recommendation. Id. at 77.

Since the release of the TIB Order, OMB Director Jacob J. Lew, released on May 14, 1999, OMB Memorandum 99-17 to the heads of federal executive department and agencies. That Memorandum regards "Minimizing Regulatory and Information Technology Requirements That Could Affect Progress Fixing the Year 2000 Problem". Relevantly, that Memorandum provides:

> As you know, the Year 2000 problem presents a major challenge to each of our organizations as well as to the many organizations with whom we relate. As your agency continues to make progress on this problem, it is important that you consider the potential effect of regulatory actions or changes to information technology (IT) systems on the Year 2000 readiness of regulated entities and your agency. To the extent you can do so while meeting your statutory responsibilities, your agency should not establish requirements that would have an adverse effect on that readiness, if such requirements can be delayed or if there is an alternative that would not have an adverse effect.
>
> While I understand the importance of agencies achieving their regulatory goals, it is important that these goals be timed in such a way that time-sensitive work on the Year 2000 problem not be jeopardized. Implementing a regulation often requires changes to the information systems of regulated entities. Accordingly, before issuing a final regulation, please use your existing process for reviewing regulations to consider the effect of the regulation on the Year 2000 readiness of regulated entities and consider alternatives to minimize that effect, such as postponing the effective date of the regulation. I have asked Desk Officers in the Office of Information and Regulatory Affairs to assist your Regulatory Policy Officer on this matter and to provide assistance in assessing any effects on Year 2000 readiness in reviewing agency rules. . . .

[http://www.cio.gov/minregi.htm.] Based on good cause shown by virtue of this directive and the fact that the majority of the industry and the world are now critically focusing upon Y2K, the FCC should allow carriers to hold off on implementing the highlighting and deniable/non-deniable requirements and other major format, software or systems changes until the period in which the Y2K efforts are in the clear, i.e., by April 1, 2000. Y2K periods are potentially set to trigger in some software/systems in September 1999, on or around January 1, 1999, and on through to March 1999, since February 2000 constitutes a leap year. Further, SILECs and other industry carriers may be subject to separate state regulatory requirements concerning Y2K preparatory/contingency planning matters. However, USTA points out that large ILECs reserve the right to challenge the FCC on the issue of highlighting and listing deniable/non-deniable charges. USTA large members have complained to it that there are operational problems involved concerning these two matters. OMB may wish to direct the FCC to hold these requirements in abeyance until a full and fair evaluation of the cost impacts and or feasibility can be assessed.

(3) The FCC failed to recognize that SILECs will incur tremendous regulatory, managerial and economic burdens in having to be in compliance with the TIB Order.

A small ILEC exemption was sought in this proceeding by the Office of Management and Budget (OMB). See TIB Order at ¶ 76: "OMB recommends that [the FCC] not impose undue burdens on wireless providers and small wireline services; and urges that the flexibility be given to small companies that may experience significant cost and managerial issues related to implementation of billing requirements." As per ¶102 of the TIB Order, the FCC said it declined to adopt many of the proposals in its Notice that would be most costly for small entities and small incumbent LECs to implement. Specifically, it did not require that these entities indicate each new service ordered by a customer each month;[3] and that such carriers provide a detailed breakdown of their costs incurred due to federal regulatory action. The FCC said it permitted these carriers to use their discretion to describe the nature and purpose of these charges to their customers. On the other hand, the FCC will still require compliance as to all other matters by small incumbent LECs. However, the FCC said it "[will] allow carriers considerable discretion to satisfy their obligations in a manner that best suits their needs and those of their customers, thus minimizing the economic impact on small carriers to the greatest possible extent."

However, the FCC failed to provide a cost-analysis addressing the cost compliance burden for SILECs to comply with the applicable provisions of the FCC TIB Order. Some SILECs companies report that they may have to stop billing for long-distance companies (IXC) in order to comply with the Order at n.126,[4] because adding language to the bill as required by the IXC might conflict with the SILEC's character limitations. Thus, loss of revenue could result if a SILECs had to decline an IXC's business. Large ILECs have also complained about this same problem. In this

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[3] However, as to ILECs and others the FCC imposed this requirement, yet it did not accept arguments that to do this would be prohibitively expensive. TIB Order at para. 35. OMB should recognize the cost burdens inherent in this and take appropriate measures with the FCC to address the lack of deference given to carrier concerns about this relevant burden. In n. 97 carriers argued identifying new service charges each month would require comparing approximately 40 million billing lines against the previous month's entries; others argued it would require substantial and costly modification of three principal billing systems and approximately 30 interacting databases that are used to produce 12.2 million bills per month (citations omitted).

[4]"We note that the precise language used to describe clearly and conspicuously those charges for which non-payment would not result in termination of local service is at the discretion of the carrier that is seeking payment for these charges. Thus, while a carrier may elect to have another entity bill the charges, this guideline does not permit the billing entity to decide unilaterally the appropriate language."

regard, the FCC failed to recognize that SILECs and ILECs will have to spend time negotiating with IXCs on the language for the relevant billing of the relevant services.

One SILEC USTA member estimated that the cost of reprogramming its system to specify "deniable" or "nondeniable" charges would cost the company $15,000.00 and take approximately 120 days to complete. Another expressed concerns about the extra postage that may be required as a result of having to add changes to the bill. Another SILEC USTA member indicated it would have to pay about $5,000 to hold a focus group to determine what its customers felt could be clarified. This would be a burden if the company had to do so before July 26 and be in compliance by that date. Further, in that regard, the FCC has placed a FNPRM on the issue of standarized labelling for federal charges. To the degree that more characters will have to be added to the bill format, carriers will be burdened in accommodating this, especially after the FCC rules on this matter; and after having ordered the other changes to implement the TIB Order. Carriers were asked by the FCC to form focus groups with consumers to determine the manner in which such charges should appear on the bill. The FCC expects carriers to pick up these costs. Consumers ultimately may have to pick up these costs. Further, the time frame in which to provide comments on this matter and organize focus groups, especially during the height of Y2K efforts is unreasonable. OMB should alert the FCC as to this problem and recommend a longer period for evaluation and other relevant considerations. To the degree that SILECs may be the subject of complaints before the FCC for violation or noncompliance with the TIB Order and to the extent the FCC could determine that a waiver of SILECs is in order after concluding its TIB FNPRM, OMBshould take appropriate action to enable avoidance of this problem.

USTA additionally points out that the FCC should have but failed to adequately consider the impact as to all affected parties. Specifically, the FCC did not provide a response as to why wireless carriers where exempt by the TIB Order. USTA believes regulatory parity should be in order. However, to the extent the FCC said in a May 28, 1999 errata that the TIB Order was relevant to the wireless carriers, the FCC appears to have not afforded the necessary and consistent consideration as to this application. USTA herein is not advocating matters concerning wireless, but merely points out herein that the FCC is exercising inconsistent approaches to what it says will or will not apply. OMB should evaluate this and determine based on this alleged inconsistency whether this inconsistency or others should be reconciled (for example, the FCC did not explain whether special and customized billing arrangements were subject to all of the TIB requirements. It could be very costly for Billing and Collection LECs to revise special and customized billing arrangements to comply with certain aspects of the TIB Order). To the degree that such inconsistencies pose great problems for the industry, OMB should determine whether the entire FCC TIB action should be stayed, pursuant to PRA requirements.

The FCC may need to take a relevant sampling of the industry or other relevant actions. OMB should take immediate action to ensure that carriers are not exposed to non-compliance matters by virtue of the FCC's alleged failures in the TIB Order. Consequently, USTA asserts that OMB should not approve the FCC's actions under OMB's PRA mandate, either in whole or in part based on the matters raised herein, and should recommend the FCC take more reasoned and appropriate approaches to implementing its goals in the TIB Order.

Given the short time frame to respond to this matter, I apologize for any prolixity, redundancy and other shortcomings inherent in this filing.* Further, in the event of error concerning any statements made herein, I will file necessary updates amending or correcting any matters warranting such action. Please contact me if I can clarify any matters stated herein. I can be reached at jrones@usta.org or (202) 236-7254.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

BY JER

Julie E. Rones

Its Attorney

Attachments

cc: Mr. Eric Menge, Assistant Chief Counsel for Telecommunications
Office of Advocacy, U.S. Small Business Administration

* (USTA Errata/corrected version 7/8/99; not the letter actually filed before OMB)

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

May 27, 1999

William E. Kennard
Chairman
Federal Communications Commission
445 12th St., S.W.
Room 8-B201
Washington, DC 20554

RE: Initial and Final Regulatory Flexibility Analyses for *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Dkt. No. 98-147); *In re* Inter Carrier Compensation for ISP-Bound Traffic (CC Dkt. 99-68); *In re* Defining Primary Lines (CC Dkt. 97-181).

Dear Chairman Kennard:

As part of its statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory enforcement Fairness Act of 1996 ("SBREFA"),[1] the Office of Advocacy, U.S. Small Business Administration ("Advocacy") has reviewed the following actions by the Federal Communications Commission ("FCC" or "Commission"):

- *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *First Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No. 98-147, FCC 99-48, (rel. March 31, 1999)("Broadband Order");
- *In re* Defining Primary Lines, *Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. 97-181, FCC 99-28 (rel. March 10, 1999)("Primary Lines Order"); and
- *In re* Inter-Carrier Compensation for ISP-Bound Traffic, *Notice of Proposed Rulemaking*, CC Dkt. 99-68, FCC 99-38 (rel. Feb. 26, 1999)("Reciprocal Compensation Order").

In each of these actions, the FCC has stated that it will exclude small incumbent local exchange carriers ("ILECs") from the definition of "small entity" and "small business concern" under the RFA, and has justified its conclusion that an ILEC cannot be a small entity because it is dominant in its field of operation.[2] Advocacy does not agree that small ILECs are dominant in

[1] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).
[2] Broadband Order, Appendix C, para. 4; Primary Lines Order, paras. 39, 52; Reciprocal Compensation Order, para.

their fields of operation, and asserts that the Commission's refusal to recognize small ILECs as small businesses is incorrect and contrary to the spirit and the letter of the RFA.

For the purposes of the RFA, 5 U.S.C. § 601(3) adopted the following definition for small businesses:

> the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.[3]

Section 3 of the Small Business Act states that a small business is one that is independently owned and operated and not dominate in its field of operation.[4] In addition, Section 3 allows the Administrator of the Small Business Administration ("SBA") to specify detailed definitions to determine small business concerns.[5]

Pursuant to that authority, the SBA implementing regulations for the Small Business Act clearly state that dominance in a "field of operation" is determined on a national basis.[6] Furthermore, the SBA's Office of Hearings and Appeals has upheld that dominance is determined on a national basis.[7] Unless the Commission has complied with the requirements of Section 601(3) of the RFA and consulted with Advocacy and allowed public comment on a changed definition, it must follow the definition as laid out by the SBA and consider dominance on a national basis.

Failure to use the proper size standard in the RFA analysis is reversible error. In *Northwest Mining Ass'n v. Babbit*, the D.C District Court remanded a rule which utilized a small business size standard that was not in compliance with the SBA's size standards.[8] Specifically, the court stated that the agency's reasons for using another size standard were:

> unconvincing in light of the clearly mandated procedure of the RFA. The definitions section of the RFA uses phrases such as "'small entity' *shall have* the same meaning. . ." . . . Words such as these do not leave room for alternate interpretations by the agency.[9]

Small ILECs are not dominant in the national telecommunications industry and qualify as small entities. Treating small ILECs as small entities is in keeping with the spirit of the RFA and the Telecommunications Act of 1996. Compliance burdens such as additional recordkeeping requirements that are inconsequential to the large ILECs can cripple a smaller ILEC. Moreover, small ILECs are not likely to have the market share or market power of the Regional Bell

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41.
[3] 5 U.S.C. § 601(3).
[4] 15 U.S.C. § 632 (a).
[5] 15 U.S.C. § 632 (b).
[6] 13 C.F.R. § 121.102(b).
[7] Size Appeal of Joan of Arc Electric Supply Co., No. 4237 (1997); Size Appeal of George E. Hill, No. 4222 (1996); Size Appeal of Control Laser – Orlando, Inc. No. 511 (1971).

[8] 5 F. Supp 2d 9 (D.D.C. 1998).
[9] *Id.*

Operating Companies and GTE. Regulations that are necessary to prevent a large ILEC from exerting undue influence on the market are not necessary for a small ILEC. Regulatory flexibility was implemented by Congress to combat this sort of uneven regulatory burden and to encourage agencies to implement regulations that address only those entities that are the source of the problem.

Advocacy requests that the Commission amend its regulatory flexibility analyses in the above-listed actions to comply with the small business definition as defined by the Small Business Administration. Furthermore, Advocacy asserts that the Commission must include small ILECs within the small business definition in future analyses to comply with the requirements of the RFA.

Sincerely,

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cc: Honorable Susan Ness
Honorable Michael Powell
Honorable Harold Furchtgott-Roth
Honorable Gloria Tristani
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UNITED STATES TELEPHONE ASSOCIATION

(USTA Attachment B)

June 21, 1999

Ex Parte

William E. Kennard
Chairman
Federal Communications Commission
445 12th St., S.W., Room 8-B201
Washington, D.C. 20554

RE: Initial and Final Regulatory Flexibility Analyses for *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Dkt. No. 98-147); *In re* Inter Carrier Compensation for ISP-Bound Traffic (CC Dkt. 99-68); *In re* Defining Primary Lines (CC Dkt. 97-181).

Dear Chairman Kennard:

I write on behalf of USTA members to endorse the conclusions presented to you by the U.S. Small Business Administration in the May 27, 1999 letter to you from Jere Glover, Chief Counsel, Office of Advocacy. Small Incumbent Local Exchange Carriers (ILECs) are defined as small entities and small business concerns under the Regulatory Flexibility Act of 1980 (RFA). USTA is on record in a number of Commission proceedings calling upon the Commission to recognize that the market power of small ILECs must be evaluated on a national basis. Small ILECs certainly are not dominant providers of telecommunications services and the regulatory requirements imposed on them should reflect this fact. Specifically:

1. On August 29, 1996, USTA argued that the interexchange telecommunications market is a national market in which independent LECs, including all small ILECs, compete with national interexchange carriers.[1]

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[1] In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 as amended and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Comments of the United States Telephone Association, CC Docket No. 96-149, August 29, 1996, pg. 2-3.

2. On October 11, 1996, USTA recommended adopting the size standard of two percent of the nation's access lines installed in the aggregate nationwide as the standard below which a LEC would qualify for small business treatment under the RFA.[2]

3. On August 17, 1998, USTA challenged the Commission's contention that small ILECs are dominant in their field by pointing out that as of February 8, 1996, any competitor may enter any LEC area whenever it decides to proceed.[3]

USTA wholeheartedly supports the Office of Advocacy in asserting that the Commission's refusal to recognize small ILECs as non-dominant is incorrect and contrary to the spirit and letter of the RFA. Based on this determination, it is unjustified for the Commission to continue treating small ILECs as dominant providers of telecommunications services. Beyond this, continuing to ignore the conclusions of the SBA unnecessarily increases the compliance burden on small ILECs.

Sincerely,

Roy Neel
President & CEO

c: Honorable Susan Ness
Honorable Michael Powell
Honorable Harold Furchtgott-Roth
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[2] In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Reply Comments of the United States Telephone Association, GN Docket NO. 96-113, October 11, 1996, pg. 2.

[3] In the Matter of Access Charge Reform for Incumbent Local Exchange Carriers subject to Rate-of-return Regulation, Comments of the United States Telephone Association, CC Docket No. 98-77, August 17, 1998, pg. 32.

CERTIFICATE OF SERVICE

I, Nicole Shackelford, do certify that on July 9, 1999, Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

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